NO. 86-2025

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ISAIAH BRUCE KING, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON

PETITION FOR A WRIT OF CERTIORARI

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Counsel for Petitioner

June 12, 1987

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QUESTIONS PRESENTED

1. Whether an affidavit for search warrant which fails to allege any objective facts justifying the officer's conclusion that contraband can be found in the residence sought to be searched satisfies the Fourth Amendment of the Constitution of the United States.

2. Whether failure to require disclosure of the name and address of an informant, under the circumstances of this case, violates the right to compulsory process as contained within the Sixth Amendment of the Constitution of the United States.

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STATUTES

The petitioner Isaiah Bruce King respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the Fourteenth Supreme Judicial District of Texas at Houston, entered in this proceeding on April 24, 1986.

OPINION BELOW

The opinion of the Court of Appeals of the Fourteenth Supreme Judicial District of Texas is reported at 710 S.W.2d 110 and may be found in the Appendix at page i.

JURISDICTION

The judgment of the Court of Appeals of the Fourteenth Supreme Judicial District of Texas was entered on April 24, 1986. A timely Petition for Discretionary Review was filed in the Texas Court of Criminal Appeals, and refused by that Court on February 25, 1987. An Application for Extension of Time in Which to File Petition for Writ of Certiorari was granted on April 25, 1987, extending the time for filing this Petition until May 26, 1987. This Court's jurisdiction is invoked under 28 U.S.C. s. 1257(3).

STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor; and to have the Assistance of Counsel for his defence

Constitution of the United States, Fourteenth Amendment, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, an attorney, was convicted in the 179th District Court of Harris County, Texas of the offense of possession of cocaine with intent to deliver on May 23, 1985, following a trial to the court. On the same date, he was sentenced to 10 years in the Texas Department of Corrections and a fine of $7,500. (Sentencing, Vol. V of V, pg. 6-7).

The contraband introduced in evidence in his trial was seized by law enforcement authorities pursuant to a search warrant. The affidavit for the warrant was in two parts. The first part contained the agent's conclusion that a quantity of cocaine could be found in apartment #182 of the Scotland Yard apartments and that it was possessed there by one Isaac Bruce King. The second part of the search warrant affidavit contained the facts upon which the conclusion was based, as follows:

> On April 20th, 1982, I, L. Carwell, a special agent with the Drug Enforcement Administration received information from a confidential credible and reliable informant, who stated that a black male known as Issac Bruce King was in possession of a large quanity [sic] of cocaine for the purpose of sale. Special Agent, Carwell, the affiant in this affidavit was also advised by the informant that he had been to The Scotland Yard appartment [sic] complex within the last three hours and observed a black male

> known as Charles in possession of a large quanity [sic] of cocaine. The informant further stated to your affiant that the appartment [sic] was under the control and charge of a black male known as Issac Bruce King, who was being visited by a black male known only as Charles, who was assisting Issac Bruce King in the sale of the cocaine. The informant further [sic] stated that he had been to this appartment [sic] on numerous occassions [sic] in the past and has seen Issac Bruce King in possession of cocaine for the purpose of sale. (Vol. II of IV - see Appendix, page xi.)

On December 13, 1984, Petitioner had filed a motion to suppress the evidence obtained pursuant to the warrant, which motion was denied by the trial court on December 13, 1984. In this instance the court was merely restating a ruling made on the search warrant during an earlier proceeding. In that proceeding the court denied the motion to suppress on October 13, 1982.[1]

Petitioner's contention that the search was illegal was rejected by the Court of Appeals for the Fourteenth Judicial District. The Texas Court of Criminal Appeals denied discretionary review. The federal constitutional issue was

1. Petitioner was first convicted upon a plea of guilty, reserving issues for appeal. That conviction was reversed based upon the unconstitutionality of the new Texas Controlled Substances statute. On new trial, the case was tried to the court, sitting without a jury, and Petitioner was again convicted. The search and informant issues overlapped the two proceedings, conducted pursuant to the same indictment.

raised in both of these courts by specific points of error in Petitioner's briefs. (See Appendix, pgs. xiv and xvi.)

Both prior to and during Petitioner's trial he sought disclosure of the name and address of the State's confidential informant. His defense was that he did not possess cocaine *with intent to deliver.* A document entered into the record as "Defense Tender No. 1" indicates that the informant discussed purchasing the cocaine in this case with several other persons on the day in question, but not with Petitioner. (Vol. I of V, pg. 356, Appendix, pg. xvii.) In this document, the informant is designated as SM3-82-0021. The document, a DEA Investigation Report, indicates that SM3-82-0021, on April 20, 1982:

> . . . had spoken with an individual named William LOVELADY at telephone number 713/635-7079 in Houston, Texas. William LOVELADY informed SM3-82-0021 that he (LOVELADY) was selling ounces of cocaine for $2,500 an ounce. LOVELADY then transferred his telephone to a three-party conversation and allowed SM3-82-0021 to speak with Harry J. WILLIAMS, who informed SM3-82-0021 that he had two (2) kilograms of cocaine and was selling ounces of cocaine for $2,200 if SM3-82-0021 purchased two (2) or more ounces.
>
> 2. At approximately 5:30PM, SM3-82-0021 drove to the residence of Isaiah B. King located at 2250 Holly Hall #182, Houston, Texas. SM3-82-0021 stated that KING was in possession of a large shipment of cocaine that had just arrived from

Florida. SM3-82-0021 was shown a large quantity of cocaine. Harry J. WILLIAMS instructed an individual, identified only as Charles LNU, to show the CI (SM3-82-0021) the cocaine.

Petitioner testified that he was not living at his apartment at that time, but with his girlfriend and that he had no knowledge of the presence of the cocaine in his apartment. (Vol. III of V, pg. 32).

The court's failure to order disclosure of the identity and address of the informant prohibited Petitioner from obtaining perhaps the most significant witness in his favor. All the available information about SM3-82-0021 indicates that he or she had not seen Petitioner in possession of cocaine and had in fact been told by LOVELADY and WILLIAMS that it was their cocaine and ~~they~~ were selling it. .

This issue was presented to the Fourteenth Court of Appeals and the Texas Court of Criminal Appeals and rejected.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT INTERPRETING THE FOURTH AMENDMENT.

This court in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), revisited and revised the manner in which courts in this country review search warrants. Petitioner submits, however, that the affidavit for warrant in this matter must fail regardless of whether it is viewed under the *Aguilar*[2]*-Spinelli*[3] approach or under the *Gates*[4] approach.

The first portion of the affidavit is simply a conclusory statement by the agent that cocaine can be found in apartment #182 at the Scotland Yard apartment complex. This is not sufficient. *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed.159 (1933). Before a warrant could properly be based upon the conclusions of the agent contained in this affidavit there must be, also within the affidavit, sufficient facts to support the conclusion, to wit: that cocaine is to be found in Apartment #182. *Illinois v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333.

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2. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 23 (1964).

3. *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

4. *supra*.

The portion of the affidavit in this case purporting to establish facts supporting the agent's conclusions contained the following facts:

1. That an informant had been to the Scotland Yard apartment complex within the last three hours and observed a black male known as Charles in possession of a large quantity of cocaine.

2. The apartment (without reference to a particular apartment) was under the control and charge of a black male known as Issac Bruce King, who was being visited by a black male known only as Charles, who was assisting Issac Bruce King in the sale of the cocaine.

3. That the informant had been to the apartment on numerous occasions in the past and had seen Issac Bruce King in possession of cocaine for the purpose of sale.

According to the affidavit, the informant also stated that Issac Bruce King was in possession of a large quantity of cocaine for the purpose of sale. This, however, is merely a conclusion of the informant without factual basis which cannot be bootstrapped into the conclusion of the agent and thereby become a fact upon which to base probable cause.

It is crucial to note that there is not one factual statement in the affidavit that cocaine has been observed or

that the affiant or informant have been told that cocaine was present in apartment #182. The facts are that the informant saw cocaine at the "complex," which is a complex of 332 apartments. (Vol. II of IV, pg. 25, - See Appendix, pg. xi.)

Illinois v. Gates, Id., was not the end of questions regarding the validity of search warrants, as some have suggested, but simply the beginning of a new approach, or more appropriately, a return to a prior approach. As Justice Rehnquist pointed out:

> Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of an affiant that "he has cause to suspect and does believe" that liquor illegally brought into the United States is located on certain premises will not do. *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933). An affidavit must provide the magistrate with a substantial basis for determining probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement that "[a]ffiants have received reliable information from a credible person and do believe" that heroin is stored in a home, is likewise inadequate. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). As in *Nathanson*, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the

bare conclusions of others. *Id.* at 462 U.S. 239, 103 S.Ct. 2332-2333.

If an agent says he has information causing him to believe contraband is in a certain location, a warrant may not issue for that location. If an agent says that a reliable person gave him information causing him to believe contraband is in a certain location, a warrant may not issue for that location. If an agent says he has information causing him to believe contraband is in a certain location because a reliable informant told him he had seen cocaine near that location, a warrant may not issue for that location. And finally, if an agent says he has information causing him to believe contraband is in a certain location because a reliable informant has information which causes him (the informant) to believe contraband is in a certain location because such informant has seen contraband near that location, a warrant may still not issue for that location.

The last example is this case. The agent says he believes that cocaine is in apartment #182 because the informant believes the cocaine is in apartment #182 and that the informant has seen cocaine in the complex in which apartment #182 is located within the last three hours. Nowhere is there a fact to support the conclusion that cocaine is in apartment #182, however.

By analogy it simply would not be sufficient to say, I saw cocaine in a neighborhood, Joe lives in that neighborhood, I've seen cocaine in Joe's house in the past, therefore there is cocaine in Joe's house now. That is all this affidavit says.

Although brought to its attention, the Court of Appeals did not discuss the Fourth Amendment issue, but relied solely on state law to support the warrant.

Petitioner believes the affidavit is insufficient and that this court should grant this petition for certiorari since the decision of the 14th Court of Appeals is in conflict with this Court's prior decisions.

2. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT INTERPRETING THE SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS.

There is in the law a recognized privilege protecting the identity of informers who give information to law enforcement officials regarding the commission of crimes. This privilege, however, is not absolute. It must frequently give way when the testimony of the informant is relevant to a contested issue in the case.

In this case the informant, SM3-82-0021, had been at the Scotland Yard apartment complex during the afternoon of the day on which Petitioner was arrested. An offense report

indicates that SM3-82-0021 had had contact with three persons, Lovelady, Williams and Charles LNU. Lovelady and Williams had offered cocaine to SM3-82-0021. There is further indication in the report that SM3-82-0021 was shown a large quantity of cocaine by one or more of these persons. The report does not indicate, however, that SM3-82-0021 ever saw Petitioner on that day or talked with Petitioner on that day regarding cocaine. (Defense Tender No.1 - Appendix, pg. xvii).

Petitioner testified at his trial that other persons, Ralph King, Charles, Harry Williams were staying in his apartment and that he spent nights or part thereof with his girlfriend. (Vol. III of V, pg. 32) He testified that he had told his cousin, Ralph King, that he didn't want any drugs in his apartment. (Vol. III of V, pg. 4).

On the day of his arrest, Petitioner had returned to his apartment at 3:00 or 4:00 a.m. The three visitors were asleep at various locations in the apartment. His girlfriend came later to wake him up so that he could attend to his responsibilities as a lawyer in various courts. He was in court and in his office until about 8:00 p.m that evening. He then went to a bar, cashed a check, went to a liquor store, bought whiskey and beer and went to his apartment. He had been in his apartment

around three minutes when officers showed up with the search warrant. He did not know that there was any cocaine in his apartment. The cocaine there did not belong to him. (Vol III of V, pgs. 36-47)

During the same afternoon, during which Petitioner testified he was in court in Houston, SM3-82-0021 was meeting with various persons, including Harry Williams and Charles LNU at the apartment complex where Petitioner lives. Although SM3-82-0021's testimony to that effect is not in the record; the only indication of that is Defense Tender No. 1. (See Appendix, pg. xvii).

If Petitioner had been able to secure the testimony of SM3-82-0021, however, the witness would, undoubtedly have supported his testimony that he was not at that location the entire afternoon and that Lovelady, Williams and Charles LNU were the persons possessing and trying to sell cocaine. Such testimony could have been crucial to establishing Petitioner's claim that he did not know of the cocaine, that it was not his, and that he had no intention to distribute it.

Petitioner filed a pretrial Motion requesting disclosure of informants. (Vol I of V, pg. 265 - See Appendix). The trial court agreed to carry the motion through the case to allow

Petitioner to show a need for the disclosure. (Vol II of V, pg. 6).

During trial, Petitioner's counsel attempted to solicit testimony from agent Mathis regarding SM3-82-0021's meeting with Lovelady, Williams and Charles LNU. The State objected repeatedly and the witness indicated he had no personal knowledge of such facts. At one point, in connection with an objection, Petitioner's counsel made the following statement to the court:

> The man is on trial for having knowingly possessed cocaine with intent to deliver. And if we had the informant, he could be able to tell the Court whether he dealt with Bruce King in an effort to sell or facilitate the sale, whether Bruce King knowingly or intentionally or otherwise possessed any cocaine. And if the facts should show through the informant that the informant did not deal on April 20, 1982, with Bruce King but dealt with Harry Williams, somebody named William Lovelady, somebody named Charles whose last name is unknown, and that he never had contact with Isaiah Bruce King with respect to the cocaine which was the subject of the search warrant, then that would impact directly on the question whether Isaiah Bruce King knowingly and intentionally possessed the cocaine that was in that apartment and whether or not he possessed it, if he did, with intent to deliver it, that being the offense charged. (Vol II of V, pg. 107).

It was the trial court's view that unless the informant was present at the time of the execution of the warrant,

Petitioner was not entitled to disclosure of his identity. (Vol II of V, pg. 110).

At the conclusion of Agent Mathis' testimony, Petitioner's counsel requested that the court order him to disclose the name, address and telephone number of the informant, SM3-82-0021. The court overruled the request. (Vol II of V, pg. 126).

Finally, at the close of the case, following Petitioner's testimony, his counsel once again asked the court to order disclosure of the name of the informant

> so that this man may properly and fully be defended so the Court may know from the informant who is the only person in position to know whether they were in commercial dealings with this man as distinguished from Ralph, Harry and this person, William Lovelady, about whom I made inquiry of.
> THE COURT: Again that is overruled. (Vol III of V, pg. 91).

It was clear that Petitioner wanted this disclosure, not just for idle information, but for the purpose of issuing a subpoena to compel the informant's testimony. In this quest, Petitioner was thwarted at every turn.

Privileges such as the informer's privilege are simply not to be honored at the expense of fair trials. As this Court has indicated:

> . . . where the disclosure of an informer's identity, or of the contents of his communication, is *relevant and helpful* to the defense of an accused, or is essential to a fair determination of the cause, the privilege must give way. *Roviaro v. United States,* 353 U.S. 53, 60-61, 77 S.Ct. 623, 628, 1 L.Ed.2d 639 (1957).[emphasis added]

One of the most weighty and difficult of such cases, where a privilege comes in conflict with the Sixth Amendment, to face this Court in recent years was *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039. This case pitted executive privilege, a weighty matter, against the Sixth Amendment and the right to a fair trial. In *Nixon*, strong arguments were advanced in favor of preserving the privilege. In the instant case, the State presented no justification for shielding the informant. The words of Chief Justice Burger are especially illuminating of the issues in the instant case:

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. at 88, 55 S. Ct. at 633. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative

> presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. *Id.* at 418 U.S. 708-709, 94 S.Ct. 3108.

The Sixth Amendment right to compulsory process is, of course, applicable to State procedure as a component of fundamental due process under the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)

Petitioner urges this Court that his Petition for a writ of certiorari be granted because the decision of the Court of Appeals of the 14th Judicial District is in conflict with decisions of this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the

Fourteenth Supreme Judicial District of the State of Texas in Houston.

Respectfully Submitted

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Counsel for Petitioner

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON

APPENDIX

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--- Opinion of the Court of Appeals of the Fourteenth Judicial District, State of Texas.

Affirmed conviction, Remanded for resentencing and Opinion filed April 24, 1986

ISAIAH BRUCE KING, Appellant

No. A14-85-00432-CR VS.

THE STATE OF TEXAS, Appellee

Appeal from the 179th Judicial District
Court of Harris County, Texas
Trial Cause No. 354 192

OPINION

Trial was to the court on a plea of not guilty to the offense of possession of cocaine with intent to deliver; the punishment is confinement for ten years and a fine of $7,500. Issues before us are the validity of the search warrant, the refusal of the court to order a disclosure of the informant, sufficiency of the evidence, and the assessment of unauthorized punishment. We affirm the conviction and remand the case to the trial court for resentencing.

In his first ground of error appellant contends the affidavit for the search warrant is insufficient under both the state and federal constitutions. The affidavit for the search warrant recited:

I, L. Carwell do solemnly swear that heretofore, on or about the 20th day of April A.D. 1982 in the City of Houston Harris County, Texas, one black male known as Issac Bruce King and described as 6'0, approx., 30-38 years of age, slender build, and a full beard, and other persons unknown, did then and there possess a controlled substance, to-wit cocaine -- in a private residence apartment known as The Scotland Yard, located at 2250 Holly Hall #182. This apartment complex is further described as a beige brick with dark brown wood trim with beige doors in [sic] City of Houston, Harris County, Texas which said private residence is possessed, occupied, under the control and charge of a black male known as Issac Bruce King and described as 6'0, approx., 30-38 years of age, slender build, and a full beard, and other persons unknown.

MY BELIEF OF THE AFORESAID STATEMENT IS BASED ON THE FOLLOWING FACTS:

On April 20th, 1982, I, L. Carwell, a special agent with the Drug Enforcement Administration received information from a confidential credible and reliable informant, who stated that a black male known as Issac Bruce King was in possession of a large quantity of cocaine for the purpose of sale. Special agent, Carwell, the affiant in this affadavit [sic] was also advised by the informant that he had been to The Scotland Yard appartment [sic] complex within the last three hours and observed a black male known as Charles in possession of a large quanity [sic] of cocaine. The informant further stated to your affiant that the appartment [sic] was under the control and charge of a black male known only as Charles, who was assisting Issac Bruce King in the sale of the cocaine. The informant further stated that he had

> been to this appartment [sic] on numerous occassions [sic] in the past and had seen Issac Bruce King in possession of cocaine for the purpose of sale.
>
> Your affiant has received information from this informant on three prior occassions [sic] on on each of these occassions [sic], the information has proved to be true and correct concerning illegal narcotic activities.

While appellant makes a broadside attack upon the affidavit, it appears that the attack centers upon the fact that apartment number 182 is never specifically mentioned in the portion of the affidavit reciting the information Agent Carwell received from the informant. Specifically, appellant points to the recitations that the informant had been to "The Scotland Yard Apartment Complex"; that "the" apartment was under the control of Issac Bruce King; and that the informant had been to "this" apartment on numerous occasions in the past and had seen Issac Bruce King in possession of cocaine for the purpose of sale. Appellant relys upon *Heredia v. State*, 468 S.W.2d 833 (Tex. Crim. App. 1971) for the proposition that the facts stated in the affidavit must be so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at the time and *Gish v. State*, 606 S.W.2d 883 (Tex. Crim.App. 1980) for the proposition the facts stated must justify the conclusion that the property the subject of the search is

probably on the person or the premises to be searched at the time the warrant issues. Appellant then argues that there are "no substantial facts stated in the affidavit to indicate that the cocaine was probably in the possession of King or within the confines of Apartment No. 182 at the Scotland Yard Complex at the time the search warrant issued." We believe appellant's construction of the affidavit is inconsistent with the requirement that the courts interpret such affidavits in a "common sense and realistic manner." *Rumsey v. State,* 675 S.W.2d 517, 521 (Tex. Crim. App. 1984). We believe that this construction would also prohibit the trial court from making reasonable inferences from the facts set forth in the affidavit, as is clearly authorized. *Gish* at 886.

Looking at the affidavit in its entirety, it appears obvious that the references to "the" apartment and "this" apartment clearly refer to apartment number 182 of the Scotland Yard Apartments as described in the beginning of the affidavit. We do not find a fatal flaw in the affidavit. Appellant's first ground is overruled.

In his second ground of error appellant contends the court erred in refusing to order the disclosure of the informant. Appellant recognizes the accepted rule that identification of the informant need not be disclosed unless: (1) the informant

participated in the offense; (2) was present at the time of the offense or arrest; or (3) was otherwise shown to be a material witness to the transaction or as to whether appellant knowingly committed the act charged. He argues, however, that the question of appellant's intent to deliver cocaine was a central issue in the case and that the "informant's testimony would have been extremely material, relevant and helpful to the defense in showing that appellant had no intent to deliver cocaine."

We do not believe that *Bernard v. State*, 566 S.W.2d 575 (Tex.Crim.App. 1978), upon which appellant relies, is on point. There it was shown by evidence from the state's witness that the informant "initiated the arrangements for the delivery of heroin." Also, in *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), cited in appellant's brief, it was shown that "the Government's informer was the sole participant, other than the accused, in the transaction charged." *Id.* at 630. Not one of these facts is present in the case before us.

The court of criminal appeals has held that evidence, not conjecture or speculation, is required to make the requisite showing that the identity of the informant be revealed. *Gaffney v. State*, 575 S.W.2d 537, 542 (Tex.Crim.App. 1978). There is

absolutely no *evidence* that the informant fell within any of the three classes requiring his identity to be revealed. We refuse to speculate, as appellant does, that had the name of the informant been revealed and had the informant testified his testimony "would have been extremely material, relevant and helpful to the defense in showing that appellant had no intent to deliver cocaine." Appellant's second ground is overruled.

In his third ground of error appellant contends the trial court erred in admitting into evidence the packet containing 2.5 grams of cocaine because of a break in the chain of custody of the exhibit following its removal from his coat pocket. As a basis for his contention he points to the fact that the officer who actually recovered the exhibit did not positively identify it. Prior to executing the warrant the officers agreed among themselves to have Officer Cargill, one of their number, responsible for maintaining control of the evidence. Officer Clarke testified he removed the cocaine from appellant's pocket and that the exhibit shown to him appeared to be the packet, but, that he could not positively so state because he did not place any identifying marks thereon. However, Officer Cargill testified that he had been designated to keep track of the evidence recovered, that he observed Officer Clarke remove the exhibit from appellant's pocket, that Clarke

immediately handed the packet to him, that he placed his initials thereon, that he kept the packet in his possession until he deposited it in the chemist's lock box and that the packet exhibited to him in court was the packet removed from appellant's pocket. We disagree that there was a break in the chain of custody. Appellant's third ground is overruled.

In his fourth ground of error appellant contends the evidence is insufficient to sustain the conviction. Viewing the evidence in the light most favorable to the court's finding, as we are required to do, the evidence shows that some thirteen officers of the Drug Enforcement Administration and the Houston Police Department executed a search warrant for drugs in appellant's designated apartment. Appellant, dressed in a suit, answered their knock on the door. As the officers entered, they placed appellant and two other males who were inside the one-bedroom apartment under arrest. A search of appellant revealed a plastic bag containing 2.5 grams of 79.2 percent pure cocaine in his inside suit coat packet and some six and one-half pounds of cocaine ranging from 75.6 percent to 90.5 percent purity, packaged in several individual containers in a brown paper sack, in the bottom of his wet bar. A set of "triple beam scales", described as those used in weighing drugs, and some plastic baggies were in plain view on the table. A

small amount of loose white powder substance was observed on the drain board near the kitchen sink. And, cash described as "some quantity of money" and two pistols were found in the apartment. the evidence shows that appellant rented the apartment, paid the rent and paid the utilities. Further evidence from an undercover narcotic officer shows that cocaine of the purity recovered in this case would normally be "cut" or diluted one or two times which would at least double its weight and make the street value in gram packages of the "cut" cocaine in excess of seven hundred thousand dollars.

Appellant, testifying in his own behalf, stated the other two persons arrested with him were his cousins, one of whom had lived with him for some three weeks and the other (Ralph) who had just arrived some three days before the arrest. The substance of his testimony was that another person named Charles, "a partner" of Ralph's, had also come to his apartment two days prior to his arrest. He stated that Ralph had said something to him (appellant) about some cocaine, but he told Ralph he didn't want any cocaine in his apartment. As to the 2.5 grams found in his coat pocket, appellant explained he had arrived home only minutes before the search, had both arms full of a supply of liquor and that Ralph placed a package in his pocket, telling him "Charles left this for you."

As we understand appellant's argument, he contends that the only evidence which would circumstantially show an intent to deliver is the large quantity of cocaine in the paper bag. Appellant reasons that since he denied he knew it was there, the only evidence which would circumstantially link him to it would be the 2.5 grams found in his pocket. But, appellant reasons, this inference is impermissible because of the circumstances under which, according to his testimony, the cocaine was placed in his pocket. He alleges he did not knowingly exercise control over the 2.5 grams, because the package was placed in his pocket by someone else and he did not know it was cocaine. We are not impressed with this reasoning. While this was proper reasoning to advance before the trier of fact, we are not at liberty to so view the evidence. We are bound to view the evidence in the light most favorable to the finding of the trial court. Further, the trial court was not obligated to accept as true appellant's version of the facts and it is obvious that he did not do so. Finally, the burden was not on the state to prove appellant had the exclusive possession of the drug. On the evidence submitted the court was authorized to conclude the drug was jointly possessed. The fourth ground is overruled.

In his fifth ground appellant complains that the fine of $7,500 assessed is unauthorized. The state agrees and so do we. The decision in *Ex parte Crisp*, 661 S.W.2d 944 (Tex.Crim.App. 1983) invalidated the statute authorizing the assessment of a fine in addition to punishment. While Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1986) passed by the last session of the legislature authorizes the appellate court to reform the sentence by deleting an unauthorized punishment assessed by the *jury*, it does not authorize same where the punishment was assessed by the court, as was done here. In accordance with *Ex parte Johnson*, 697 S.W.2d 605 (Tex.Crim.App. 1985), we remand this case to the trial court for a new punishment hearing.

The judgment of conviction is affirmed. However, we remand the case to the trial court for the purpose of conducting a new punishment hearing.

It is so ordered

/s/ Sam Robertson
Justice

Judgment Rendered, and Opinion filed April 24, 1986.

Panel consists of Chief Justice J. Curtiss Brown and Justices Murphy and Robertson.

--- Affidavit for Search Warrant (Vol. II of IV, pg. 25):

COMPLAINT - Affadavit for Search Warrant for CONTROLL SUBSTANCE DRUGS

STATE OF TEXAS |

COUNTY OF HARRIS |

I, L. Carwell do solemnly swear that heretofore, on or about the 20th day of April A.D. 1982 in the City of Houston Harris County, Texas, one Black Male known as Issac Bruce King and described as 6'0, approx, 30-38 years of age, slender build, and a full beard, and other persons unknown.
did then and there unlawfully possess and does at this time unlawfully possess a controlled substance, to wit: cocaine. ------- - in a private residence apartment known as The Scotland Yard, located at 2250 Holly Hall #182. This appartment complex is further described as a beige brick with dark brown wood trim with beige doors in City of Houston, Harris County, Texas which said private residence is possessed, occupied, under the control and charge of A Black Male known as Issac Bruce King and described as 6'0, approx., 30-38 years of age, slender build, and a full beard, and other persons unknown.
My belief of the aforesaid statement is based on the following facts:
On April 20, 1982, I, L. Carwell, a special agent with the Drug Enforcement Administration received information from a confidential credible and reliable informant, who stated that a black male known as Issac Bruce King was in possession of a large quantity of cocaine for the purpose of sale. Special agent, Carwell, the affiant in this affadavit was also advised by the informant that he had been to The Scotland Yard appartment complex within the last three hours and observed a black male known as Charles in possession of a large quanity of cocaine. The informant further stated to your affiant that the appartment was under the control and charge of a black male known as Issac Bruce King, who was being visited by a black male known only as Charles, who was assisting Issac Bruce King in the sale of the cocaine. The informant further stated that he had been to this appartment on numerous occasions in the past and had seen Issac Bruce King in possession of cocaine for the purpose of sale.

Your affiant has received information from this informant on three prior occasions and on each of these occassions, the information has proved to be true and correct concerning illegal narcotic activities.
Wherefore, I ask that a warrant to search for and seize the said controlled substance at the above described premises be issued in accordance with the law in such cases provided.

/s/ Larry N. Carwell

Sworn to and subscribed before me by Larry N. Carwell on the 20 day of April, A.D. 1982.

/s/ Angel Fraga
Magistrate
Judge of Municipal Court
No. 8 of the City of
Houston, Harris County,
Texas

--- Excerpt from Petitioner's Brief, 14th Court of Appeals:

NO. 14-85-00432-CR

IN THE COURT OF APPEALS

OF THE STATE OF TEXAS

FOURTEENTH SUPREME JUDICIAL DISTRICT

ISAIAH BRUCE KING, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

ON DIRECT APPEAL FROM THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS
179TH JUDICIAL DISTRICT
CAUSE NO. 354192

APPELLANT'S BRIEF

JEFFERSON, MIMS,
PLUMMER & RICE, P.C.

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Houston, Texas 77002
713/654-9009
State Bar No. 10610000

Attorneys for Appellant

--- Excerpt from Page 14:

The Fourth Amendment to the U.S. Constitution as interpreted in *Illinois v. Gates, supra*, requires that Appellant's Conviction be reversed and a new trial ordered.

--- Excerpt from Petitioner's Brief, Texas Court of Criminal Appeals:

NO. _____

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ISAIAH BRUCE KING,

Petitioner

VS.

THE STATE OF TEXAS

Respondent.

PETITION FOR DISCRETIONARY REVIEW

(14th Court of Appeals Cause No. A-14-85-00432-CR)

ANDREW L. JEFFERSON, JR.
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Houston, Texas 77004
713/654-9009
SB#: 10610000

Counsel for Petitioner

--- Excerpt from Page 5:

The federal argument was bottomed upon the requisites of Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The ruling in Illinois v. Gates requires that the affidavit provide the magistrate with sufficient facts, as distinguished from the mere conclusions of others, to show the existence of probable cause.

The Court of Appeals did not address the federal argument in its opinion.

--- Excerpt from Defense Tender No. 1 (Vol. I of V, pg. 356):

SYNOPSIS:

On April 20, 1982 at approximately 9:30PM at 2250 Holly Hall #182, Houston, Texas, S/A's of the DEA and HPD Narcotics Office executed a search warrant at the aforementioned address arresting three (3) defendants and seizing 3.136 grams of cocaine.

DETAILS:

1. On April 20, 1982 at approximately 11:45AM, SM3-82-0021 telephonically spoke with S/A Carwell at the Houston D.O. SM3-82-0021 informed S/A Carwell that SM3-82-0021 had spoken with an individual named William LOVELADY at telephone number 713/635-7079 in Houston, Texas. William LOVELADY informed SM3-82-0021 that he (LOVELADY) was selling ounces of cocaine for $2,500 an ounce. LOVELADY then transferred his telephone to a three-party conversation and allowed SM3-82-0021 to speak with Harry J. WILLIAMS, who informed SM3-82-0021 that he had two (2) kilograms of cocaine and was selling ounces of cocaine for $2,200 if SM3-82-0021 purchased two (2) or more ounces.

2. At approximately 5:30PM, SM3-82-0021 drove to the residence of Isaiah B. KING located at 2250 Holly Hall #182, Houston, Texas. SM3-82-0021 stated that KING was in possession of a large shipment of cocaine that had just arrived from Florida. SM3-82-0021 was shown a large quantity of cocaine. Harry J. WILLIAMS instructed an individual, identified only as Charles LNU, to show the CI (SM3-82-0021) the cocaine.

3. At approximately 6:00PM, SM3-82-0021 telephoned S/A Mathis at S/A Mathis' residence and informed S/A Mathis that SM3-82-0021 had visited Isaiah Bruce KING'S residence and was shown a large quantity of cocaine. S/A Mathis then telephoned S/A Carwell at S/A Carwell's residence and informed S/A Carwell of the aforementioned information given to S/A Mathis by the CI, and for S/A Carwell to contact HPD Officer Reeves and proceed with the writing of a search warrant.